

1 THE HONORABLE THOMAS S. ZILLY  
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UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

9 BUNGIE, INC.,

10 Plaintiff,

11 v.

12 AIMJUNKIES.COM; PHOENIX DIGITAL  
13 GROUP, LLC; DAVID SCHAEFER; JORDAN  
14 GREEN; JEFFREY CONWAY; AND JAMES  
15 MAY,

Defendant.

No. 2:21-cv-811

PLAINTIFF BUNGIE, INC.'S  
OPPOSITION TO DEFENDANTS'  
MOTION TO SUBSTITUTE EXPERT  
WITNESS

26 PLAINTIFF'S OPPOSITION TO MOT.  
TO SUBSTITUTE EXPERT  
(No. 2:21-cv-811)

Perkins Coie LLP  
1201 Third Avenue, Suite 4900  
Seattle, Washington 98101-3099  
Phone: 206 359.8000  
Fax: 206.359 9000

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PLAINTIFF'S OPPOSITION TO MOT.  
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**Perkins Coie LLP**  
1201 Third Avenue, Suite 4900  
Seattle, Washington 98101-3099  
Phone: 206 359 8000  
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**Perkins Coie LLP**  
1201 Third Avenue, Suite 4900  
Seattle, Washington 98101-3099  
Phone: 206 359.8000  
Fax: 206.359.9000

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PLAINTIFF'S OPPOSITION TO MOT.  
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Perkins Coie LLP  
1201 Third Avenue, Suite 4900  
Seattle, Washington 98101-3099  
Phone: 206 359.8000  
Fax: 206.359 9000

## I. INTRODUCTION

The Court should deny Defendants’<sup>1</sup> Motion to Substitute Expert Witness (Dkt. No. 148, hereafter “Motion”). Defendants’ current predicament is of their own creation. The Motion comes more than *two years* after this case was filed, nearly *nine months* after the original expert discovery deadline, after *twice* rejecting Bungie’s offers to extend that deadline, and *two days* before the extended deadline, which has now passed. Defendants fail to demonstrate good cause or in any way address the prejudice to Bungie. For these reasons, and those set forth below, the Motion should be denied.

## II. BACKGROUND<sup>2</sup>

#### A. Defendants' Dilatory Approach to Expert Discovery.

Bungie initiated this litigation more than two years ago. Dkt. No. 1. Two weeks before the original November 2022 expert disclosure deadline, Bungie suggested that the parties extend that deadline “[g]iven [Defendants’] pending potential counterclaims which . . . will require expert analysis and reports[.]” Dkt. No. 131-02, Ex. 2. Defendants refused, explaining they would not agree to extend the expert disclosure deadline or any other discovery deadlines because the “case has been pending for nearly one-and-one-half years [and] . . . needs to be resolved and brought to a conclusion as quickly as possible.” *Id.* And so Bungie served its expert reports on November 21, 2022, as required by the then-current case schedule. Dkt. No. 131, ¶3. Defendants did not disclose any experts. In January 2023, when Bungie again suggested extending the case schedule due to unavoidable scheduling conflicts, Defendants again denied Bungie’s request. Dkt. No. 80.

During these many scheduling- and expert-related exchanges, Defendants never once suggested that they planned to use a testifying expert. On March 20, 2023, during the 30(b)(6)

<sup>1</sup> “Defendants” refers collectively to AimJunkies.com, Phoenix Digital Group, LLC (“Phoenix Digital”), David Schaefer, Jordan Green, Jeffrey Conway, and James May.

<sup>2</sup> All Exhibits are attached to the Declaration of William C. Rava (“Rava Decl.”) unless otherwise noted.

1 deposition of Phoenix Digital, Schaefer cryptically referred to “our expert” but refused to  
 2 disclose the expert’s name or role in the case. Nearly one month later, five months after the  
 3 close of expert discovery, and with only one month left in discovery, Defendants raised the issue  
 4 of extending the expert disclosure deadline for the first time. Dkt. No. 131-03, Ex. 3. Bungie  
 5 denied the request, explaining that it wanted to avoid further delays in the case. *Id.*; Dkt. No.  
 6 130.

7       Although the Court noted that “Defendants could have brought [their] motion sooner,”  
 8 Mr. Kraemer was ultimately permitted to serve as an expert, and Defendants served his expert  
 9 report on June 12, 2023. *See* Dkt. No. 139.

10 **B. Defendants’ Apparent Failure to Vet Mr. Kraemer.**

11       As is clear from his public LinkedIn biography, for the last 20+ years, Mr. Kraemer has  
 12 been employed at Honeywell, either directly or as a contractor. *See* Rava Decl. Ex. A; [REDACTED]  
 13 [REDACTED] [REDACTED]  
 14 [REDACTED], and Defendants have been in contact with  
 15 Mr. Kraemer about this case since at least August 2022. Ex. C.

16       With respect to his purported expert testimony in this case, Defendants’ counsel  
 17 identified Mr. Kraemer’s background at Honeywell as a basis for his purported expertise. Dkt.  
 18 No. 137 ¶ 4. In his expert report, Mr. Kraemer concurred, describing himself as being  
 19 “extremely familiar with decompiling, attaching debuggers, and memory editing programs that  
 20 give video game players advantages in games.” Ex. D. As the basis for his opinion and his  
 21 “background with respect to the matters at hand[,]” Mr. Kraemer cited two areas of experience.  
 22 First, he referred to his “hobby” of “reverse engineering . . . that turned into a website for reverse  
 23 engineering online video games for 8 years[.]” *Id.* (But, as he admitted in his report, Mr.  
 24 Kraemer had “retired from programming and reverse engineering” nearly six years ago. *Id.*)<sup>3</sup>

25 \_\_\_\_\_  
 26 <sup>3</sup> Also, Mr. Kraemer’s “retirement” would have occurred at about the same time Bungie released *Destiny 2*  
 (2017) and several years before Bungie first detected cheat software targeting *Destiny 2* (2019). That is, Bungie had  
 good reason to doubt the relevance and currency of whatever expertise Mr. Kraemer might have gained through his

1 Second, Mr. Kraemer cited as relevant “background” his experience in the “Information  
 2 Technology field for 25+ years under fortune 500 companies,” referring to his experience at  
 3 Honeywell.

4 As it would with any proffered expert in any federal court litigation, Bungie sought to  
 5 understand Mr. Kraemer’s expertise and experience as it related (or not) to his opinions.  
 6 Employing unremarkable discovery practices, Bungie sought this information directly from Mr.  
 7 Kraemer through a document subpoena and deposition. In response to document requests related  
 8 to Honeywell, Mr. Kraemer did not produce any responsive documents. [REDACTED]

9 [REDACTED] [REDACTED]  
 10 [REDACTED]  
 11 [REDACTED]  
 12 [REDACTED] [REDACTED]

13 [REDACTED] But whenever Bungie attempted to further understand Mr. Kraemer’s  
 14 background at Honeywell, it was stonewalled. [REDACTED]

15 [REDACTED]  
 16 [REDACTED]  
 17 [REDACTED]

18 Because Mr. Kraemer refused to talk about the last 20+ years of his professional  
 19 experience and training as related to his proffered expert opinions, Bungie notified Mr. Kraemer  
 20 and Defendants that Bungie intended to serve a subpoena on Honeywell seeking documents  
 21 relating to Mr. Kraemer’s employment with Honeywell, including his “role(s) and  
 22 responsibilities,” with Honeywell, “professional trainings,” and Mr. Kraemer’s “training,  
 23 education, or experience . . . in any way connected to . . . reverse engineering software . . .  
 24 analyzing network traffic and/or software security . . . [and] decompiling, reverse-engineering,

25 \_\_\_\_\_  
 26 “hobby,” making close examination of his more recent experience (and whether, for example, that included exposure  
 to current cheat and anticheat technology) all that more important.

1 and/or dumping memory related to commercial software (including video games)[.]” Dkt. No.  
 2 148-08, Ex. H.

3 Nine days after Bungie served its subpoena on Honeywell, Mr. Kraemer’s counsel  
 4 notified Bungie that Mr. Kraemer had decided to withdraw as an expert witness in this lawsuit.  
 5 Dkt. No. 148-13, Ex. M.

### 6 III. ARGUMENT

7 A motion to substitute an expert witness is functionally equivalent to a motion to amend a  
 8 scheduling order—both are governed by Rule 16(b) of the Federal Rules of Civil Procedure.

9 *See, e.g., Jones v. Nat'l R.R. Passenger Corp.*, 2022 WL 689000, at \*2 (N.D. Cal. Feb. 23, 2022)  
 10 (“Jones’s motion to substitute expert witnesses is properly analyzed under Federal Rule of Civil  
 11 Procedure Rule 16.”); *Miesen v. Henderson*, 2022 WL 392931, \*1 (D. Idaho Feb. 2, 2022)

12 (stating that “[m]otions to substitute expert witnesses are essentially motions to amend the  
 13 scheduling order” and that schedule modifications are governed by 16(b)(4)). Under Rule  
 14 16(b)’s “good cause” standard, “the existence or degree of prejudice to the party opposing the  
 15 modification might supply additional reasons to deny a motion,” but “the focus of the inquiry is  
 16 upon the moving party’s reasons for seeking modification.” *Johnson v. Mammoth Recreations,*  
 17 Inc., 975 F.2d 604, 609 (9th Cir. 1992) (citation omitted); *Magers v. Jones*, 2015 WL 925655, at  
 18 \*3 (E.D. Cal. Feb. 26, 2015) (finding that the focus of the “good cause” inquiry is on the moving  
 19 party’s “reasons for seeking modification”). “What constitutes good cause sufficient to justify  
 20 the modification of a scheduling order necessarily varies with the circumstances of each case.”

21 6A Charles Alan Wright et al. *Federal Practice and Procedure Civil*, § 1522.2 (3d ed.).

22 Defendants bear the burden of showing “good cause” to warrant substitution of Mr. Kraemer.

23 *Cervantes v. Zimmerman*, No. 17-CV-1230-BAS-NLS, 2019 WL 1129154, at \*5 (S.D. Cal. Mar.  
 24 12, 2019) (“movant bears the burden of showing good cause under Rule 16(b)”).

1     **A. Defendants' Motion Fails To Demonstrate Good Cause.**

2         Defendants have failed to carry their burden. Defendants claim that substitution is  
 3 warranted “due to circumstances outside [their] control” (Mot. p. 5), but Mr. Kraemer’s apparent  
 4 discomfort with and unwillingness to substantively participate in the foundational aspects of  
 5 expert discovery is neither a circumstance outside of Defendants’ control nor a satisfactory  
 6 explanation to warrant substitution. Defendants’ Motion fails to set forth any further details  
 7 explaining Mr. Kraemer’s “unavailability” apart from the fact that he wants “nothing further to  
 8 do with this matter.” Courts in the Ninth Circuit have found such generalized and vague  
 9 explanations to be insufficient to demonstrate good cause. *See, e.g., Enborg v. Ethicon, Inc.*, No.  
 10 220CV02477AWIBAK, 2022 WL 1300569, at \*2–3 (E.D. Cal. Apr. 29, 2022) (denying motion  
 11 to substitute where plaintiff failed to show why former expert was unable to participate in the  
 12 lawsuit, “let alone [enable the court to] determine whether it has merit and rises to the level other  
 13 courts have found to justify substitution”). The Court should do so here as well.

14         As an initial matter, Defendants’ reason for seeking substitution is not—as they claim—a  
 15 result of Bungie’s litigation conduct, but instead their own failure to properly prepare their expert  
 16 witness. Had Defendants asked Mr. Kraemer *any* questions about his supposed sensitivity to his  
 17 employer learning that he was testifying on behalf of Defendants, Defendants could have  
 18 replaced Mr. Kraemer well in advance of the close of expert discovery or otherwise resolved Mr.  
 19 Kraemer’s concerns. Instead, on the same day that Bungie served Mr. Kraemer with a subpoena  
 20 requesting documents from him related to his experience at Honeywell, Mr. Kraemer raced to the  
 21 Court seeking emergency relief. *See* Dkt. No. 148-2, Ex. B. Even a cursory inquiry by  
 22 Defendants would have avoided these issues entirely.

23         Defendants could also have many times avoided the need for this additional scheduling  
 24 order modification. Defendants repeatedly rejected Bungie’s earlier attempts to allow for the  
 25 parties to have additional time for expert discovery, and waited months after expert discovery  
 26 closed to even propose Mr. Kraemer’s now-aborted testimony.

1        Ultimately, Defendants seek permission to replace an expert a few months before trial  
 2 based solely on an unelaborated, conclusory statement that Mr. Kraemer wants “nothing further  
 3 to do with this matter” and his withdrawal is “due to circumstances outside [Defendants]  
 4 control,” after repeatedly rejecting offers for additional time by Bungie to engage in expert  
 5 discovery when this case was in its infancy. Good cause requires more than that. Defendants  
 6 chose Mr. Kraemer to serve as their expert; their delay, lack of foresight, and inadequate  
 7 preparation does not warrant a second chance. *See Miesen*, at \*2-3 (“A party’s choice upon  
 8 which expert to hire for assistance in a lawsuit is just that—a choice. Sometimes the results of  
 9 those choices go smoothly and successfully. Sometimes they do not.”) (citing *Crandall v.*  
 10 *Hartford Cas. Ins. Co.*, No. CV 10-00127-REB, 2012 WL 6086598, at \*3 (D. Idaho Dec. 6,  
 11 2012); *see also United States v. Smith*, 562 F.3d 866, 871 (7th Cir. 2009) (“If at first you don’t  
 12 succeed, try, try again’ might make a memorable maxim, but it is ill-suited as a principle for case  
 13 management.”)).

14      **B. A Testifying Expert’s Experience & Expertise Are Legitimate Areas Of Discovery.**

15        Defendants blame Bungie for Mr. Kraemer’s unavailability, alleging that Bungie’s  
 16 discovery into Mr. Kraemer’s experience and expertise intimidated him into withdrawing. Dkt.  
 17 No. 148. But Mr. Kraemer and Defendants complain of conduct that is an expected and routine  
 18 aspect of expert discovery. For an expert’s testimony to even be admissible, the expert must be  
 19 qualified—in other words, such testimony must “come from someone who is qualified to serve  
 20 as an expert by ‘knowledge, skill, experience, training, or education.’” *Bagwell v. CBS Broad.*  
 21 *Inc.*, No. CV 19-8423 DSF (ASX), 2021 WL 9145409, at \*4 (C.D. Cal. Oct. 19, 2021) (quoting  
 22 Fed. R. Evid. 702); *see also Rydman v. Champion Petfoods USA, Inc.*, No. C18-1578 TSZ, 2023  
 23 WL 3172466, at \*2, 7 (W.D. Wash. May 1, 2023) (Zilly, J.) (excluding expert opinions that were  
 24 “outside of [the purported expert’s] expertise”). This basic gatekeeping function is required for  
 25 ensuring *all* expert testimony is proper. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147  
 26

1 (1999) (Daubert imposed a special “gatekeeping obligation” on trial judges for all expert  
 2 testimony). This is precisely the type of information Bungie was seeking.

3 More to the point, Bungie was fully entitled to the information it sought—it is undisputed  
 4 that Bungie is entitled to full discovery of Defendants’ testifying expert, Mr. Kraemer, including  
 5 his purported qualifications and expertise under Rule 26(a)(2)(B). *See, e.g., State Auto. Mut. Ins.*  
 6 *Co. v. Freehold Mgmt., Inc.*, No. 3:16-CV-2255-L, 2019 WL 1436659, at \*25 (N.D. Tex. Mar.  
 7 31, 2019) (“Litigants in federal court are entitled to the disclosures that are required to be made  
 8 under Rule 26(a)(2)(B), and it is not incumbent on the opposing party to investigate or ferret out  
 9 that information as best as it can through deposition or other means of discovery at the expense  
 10 of its client.”). Whatever Mr. Kraemer’s supposed sensitivities, Bungie is entitled to determine  
 11 whether Mr. Kraemer was qualified to provide expert testimony.

12 Finally, not only was discovery into Mr. Kraemer’s background by Bungie necessary, but  
 13 it was also justified under the circumstances, given Mr. Kraemer’s outright refusal to reasonably  
 14 cooperate during the discovery process. [REDACTED]

15 [REDACTED]  
 16 [REDACTED]  
 17 [REDACTED]  
 18 [REDACTED] *see also* Ex. D. Naturally, Bungie was  
 19 attempting to discern the basis of Mr. Kraemer’s purported expertise in this matter, as it is  
 20 permitted to do so under Rule 26(a)(2)(B), and if it deemed necessary, to challenge Mr.  
 21 Kraemer’s expertise through a *Daubert* motion. [REDACTED]

22 [REDACTED]  
 23 [REDACTED] Only after it was  
 24 stymied by Mr. Kraemer did Bungie seek information directly from Honeywell.

25 Mr. Kraemer’s apparent discomfort with discovery into his purported expertise is a  
 26 failing of Defendants. Bungie’s inquiries concerning Mr. Kraemer’s background were normal

1 and predictable; Defendants and Mr. Kraemer should both have been prepared for this ordinary  
 2 course expert discovery.

3 **C. Bungie Would Suffer Significant Prejudice If Defendants' Motion Is Granted.**

4 Should the Court permit Defendants to substitute their expert at this stage, Bungie is  
 5 likely to suffer significant prejudice.

6 **1. Bungie Has Already Incurred Substantial Costs.**

7 Bungie has already incurred substantial costs in deposing Mr. Kraemer and in analyzing  
 8 and responding to Mr. Kraemer's expert report. *See* Rava Decl. ¶ 6. The cost of analyzing and  
 9 responding to a new opinion and deposing a new expert would presumably be similarly  
 10 substantial.

11 **2. Defendants' Substitution Is Likely To Cause Delay.**

12 Substitution at this late stage will undoubtedly require the re-opening of expert discovery  
 13 (which has now closed). Considering the time required previously for scheduling, planning, and  
 14 deposing Mr. Kraemer as well as the time spent analyzing, coordinating, and responding to Mr.  
 15 Kraemer's expert report, it is likely that Defendants' substitution of Mr. Kraemer will delay the  
 16 currently scheduled December 4, 2023 trial date.

17 **3. Defendants Now Know Bungie's Deposition Strategy.**

18 Bungie has already deposed Mr. Kraemer regarding the exact opinions that the new  
 19 expert will be required to adopt. *See infra* Section III.D.1. Not only do Defendants—and by  
 20 extension any new expert—know how Bungie intends to attack those opinions, but they know  
 21 the *exact questions* that Bungie may ask in order to do so. Substitution of a new expert at this  
 22 stage effectively gives Defendants and their expert witness a second bite at the apple with respect  
 23 to their expert witness' deposition and opinion defense. Defendants' failure to adequately vet  
 24 and prepare their original expert witness should not be rewarded by being put in a more  
 25 advantageous position with their second putative expert witness on the same subject. *See In re*  
 26 *Northrup Grumman Corp. ERISA Litig.*, No. CV 06-06213-AB (JCx), 2016 WL 6826171, at \*4

1 (C.D. Cal. Apr. 7, 2016) (“[T]he purpose of allowing substitution of an expert is to put the  
 2 movant in the *same position* it would have been in but for the need to change experts”) (internal  
 3 citation omitted) (emphasis added).

4 **D. The Court Should Take Steps to Minimize Prejudice to Bungie.**

5 Should the Court permit Defendants to substitute Mr. LaPorte for Mr. Kraemer at this late  
 6 stage, Bungie respectfully requests that the Court take steps to minimize the prejudice to Bungie.

7 **1. The Court Should Limit the Scope of Mr. LaPorte’s Opinion.**

8 As an initial matter, Mr. LaPorte should not be permitted to offer any opinions that are in  
 9 addition to, inconsistent with, or substantively different from the opinions espoused by Mr.  
 10 Kraemer during his deposition and disclosed in Mr. Kraemer’s report. *See Chien Van Bui v. City*  
*& Cnty. of San Francisco*, No. 11-CV-04189-LB, 2018 WL 4959056, at \*2 (N.D. Cal. Jan. 31,  
 12 2018) (granting substitution but limiting new expert’s opinion to the subject matter and theories  
 13 espoused by the previous expert; holding Defendants new expert “will not be permitted to offer  
 14 (as he does now in the current version of his proposed report) opinions different from or in  
 15 addition to those that were offered by [the prior expert]”); *Park v. CAS Enterprises, Inc.*, 2009  
 16 WL 4057888 (S.D. Cal.) (limiting new expert’s testimony to opinions and theories included in  
 17 original expert’s report was proper when expert unilaterally chose to withdraw). For this reason,  
 18 Mr. LaPorte “must limit his . . . opinions to the subject matter covered in [Mr. Kraemer’s] report  
 19 and may not testify in any manner that is contrary to or inconsistent with [Mr. Kraemer’s  
 20 testimony or report].” *Fujifilm Corp. v. Motorola Mobility LLC*, No. 12-CV-03587-WHO, 2014  
 21 WL 8094582, at \*2 (N.D. Cal. Nov. 19, 2014).

22 **2. The Court Should Award Costs and Fees To Bungie.**

23 Courts routinely award a party’s attorneys’ fees and costs to analyze and address a  
 24 substituted expert witness, even where parties have provided reasonable explanations for such  
 25 substitutions (which is not the case here). *See, e.g., Fujifilm*, 2014 WL 8094582, at \*2 (requiring  
 26 movant seeking substitution to pay for all fees and costs associated with rebutting the substitute

1 expert report); *Payless Shoesource Worldwide, Inc. v. Target Corp.*, No. CIV.A. 05-4023-JAR,  
 2 2007 WL 4414769, at \*1 (D. Kan. Dec. 14, 2007) (awarding fees and costs to cure the prejudice  
 3 suffered by defendants in light of plaintiff's untimely substitution of its damages expert); *Choina*  
 4 *v. E.I. Du Pont De Nemours & Co.*, 1996 WL 200279, at \*2 (E.D. La. Apr. 25, 1996)  
 5 ("[B]ecause plaintiff's expert refused to testify at the subsequent retrial, the only just result would  
 6 be for plaintiff to pay for defendant's additional costs in defending against a new expert.").

7 Here, if the Court allows Defendants to substitute experts, it should also require them to  
 8 post a cash bond of \$25,000 to cover the expected costs to Bungie of analyzing, investigating,  
 9 and deposing Mr. LaPorte. Although Bungie's efforts to depose Mr. Kraemer, and investigate,  
 10 research, and respond to Mr. Kraemer's expert report, cost well in excess of the \$25,000  
 11 suggested here, this amount will at least begin to pay for what Bungie expects will be a similar  
 12 effort required to address Mr. LaPorte. Bungie should not bear the substantial cost occasioned  
 13 by Defendants' lack of diligence in designating Mr. Kraemer, and should be permitted to file a  
 14 declaration of fees and costs after completing expert discovery into Mr. LaPorte, which  
 15 appropriate fees and costs would be paid from the cash bond held by the Court.

#### 16 IV. CONCLUSION

17 For the foregoing reasons, Bungie respectfully requests that the Court deny Defendants'  
 18 Motion to Substitute Expert Witness. In the alternative, if Mr. LaPorte is permitted to substitute  
 19 in, Bungie respectfully requests that the Court issue an order (1) preventing Mr. LaPorte from  
 20 offering any opinions that are in addition to, inconsistent with, or substantively different from the  
 21 opinions espoused by Mr. Kraemer, and (2) requiring defendants to post a cash bond of \$25,000  
 22 to cover Bungie's expected attorneys' fees and costs to analyze, investigate, and depose Mr.  
 23 LaPorte.

I certify that this memorandum contains 3,978 words, in compliance with the Local Civil  
Rules.

Dated: July 19, 2023

By: /s/William C. Rava

William C. Rava, Bar No. 29948  
Christian W. Marcelo, Bar No. 51193  
Jacob P. Dini, Bar No. 54115  
**Perkins Coie LLP**  
1201 Third Avenue, Suite 4900  
Seattle, Washington 98101-3099  
Telephone: +1.206.359.8000  
Facsimile: +1.206.359.9000  
WRava@perkinscoie.com  
CMarcelo@perkinscoie.com  
JDini@perkinscoie.com